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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CORNEALIUS LOPES,

Plaintiff,

Vs.

FREMONT FREEWHEELERS, et al.,

Defendants.

Case No.: C 07-6213 PJH

DEFENDANTS' SALLY WILSON,
RICHARD BROCKIE, TIMOTHY
O'HARA, AND FREMONT
FREEWHEELERS BICYCLE CLUB'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF HIS
MOTION TO DISMISS PURSUANT TO
RULE 12(b)(5) & (6)

Date: July 9, 2008

Time: 9:00am

Dept: Courtroom 3, 17th Floor

Judge: Phyllis J. Hamilton

I. INTRODUCTION

SALLY WILSON, RICHARD BROCKIE, TIMOTHY O'HARA, and
FREMONT FREEWHEELERS BICYCLE CLUB requests that this Court dismiss them
on the grounds 1) that they were not properly served, (2) that the action states claims that
are barred by the statute of limitations, 3) that the complaint fails to state a cause of
action upon which relief can be granted, and 4) that the this action is barred because of
the doctrine of res judicata as to defendant Fremont Freewheelers Bicycle Club.

II. STATEMENT OF FACTS

1 While jogging one morning on June 12, 2004 at approximately 8:20 a.m., plaintiff
2 collided with a bicyclist participating in a bicycle race in Newark, California. Plaintiff
3 was taken to Washington Hospital.
4

5 Officer Wren, who arrived at the accident shortly after it occurred, spoke to
6 various witnesses at the scene. Byron Sheppard reported that he had been directly behind
7 the bicyclist that collided with the plaintiff and that he had observed the plaintiff run
8 directly into the group of bicyclist and hold his right arm out to the side, level to the
9 ground, and strike the bicyclist in the middle of the chest. Officer Wren also spoke with
10 Jason Sage. Sage reported that Lopes had been warned to stay off the roadway and that
11 Sage had been told that on one occasion the plaintiff had responded something to the
12 effect of "F___ You Jew."
13

14 The next day, Officer Wren spoke with the plaintiff. Plaintiff denied that he had
15 been warned to stay off the course. He also denied that he had argued with any of the
16 bicyclists or stuck his arm out while jogging to interfere with the bicyclists. Later that
17 day, plaintiff faxed a written statement to Officer Wren.
18

19 According to Officer Farley's police report, upon his arrival at the scene, Officer
20 Farley spoke with witness Peter Rosa. Rosa reported that Lopes had intentionally collided
21 with the bicyclists.
22

23 On June 14, 2004, Officer Wren prepared a written police report that included the
24 above information, as well as plaintiff's written statement. Officer Wren concluded that
25 the report should be sent to the Alameda County District Attorney for review and filing
26 of "PC 242" (battery) charges against the plaintiff. Officer Wren concluded: "Victims,
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1 Parker and Rath believe this Act was intentional on Lopes behalf. They requested that a
2 report covering the details of this incident be sent to the DA's office."

3 The District Attorneys' Office subsequently asked the Newark Police Department
4 to obtain further information. In connection with this further investigation, witness Jason
5 Sage sent Officer Wren additional written statements and a CD. Several of the witnesses
6 asserted in their written statements that they had told the plaintiff to exit the bicycle
7 course. In addition, witness Tim O'Hara asserted that when he politely asked Lopes to
8 leave the course, Lopes responded: "F__ You, Jew." Officer Wren submitted both the
9 written statements and the CD to the District Attorney's Office.
10

11 On July 6, 2004, the District Attorney's Office asked Officer Wren to locate the
12 bicyclist that had collided with the plaintiff. Officer Wren produced a second
13 supplemental report identifying Bob Parker as the struck bicyclist. Officer Wren's
14 submission of the supplemental report ended his participation in the case.
15

16 On July 15, 2004, Alameda County Deputy District Attorney Lisa Faria asked
17 Newark Police Sergeant Robert Douglas to author a "Declaration in Support of Arrest
18 and/or Issuance of Warrant of Arrest" ("Declaration") to accompany the District
19 Attorney's criminal complaint for an arrest warrant against the plaintiff. Sergeant
20 Douglas read the criminal complaint and Officer Wren's police report with supplements
21 and concurred that probable cause existed to arrest the plaintiff. Accordingly, he prepared
22 and signed the Declaration. Once he submitted the declaration, his involvement with the
23 plaintiff's case ended.¹
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28 ¹ The statement of facts comes predominately from the Memorandum and Order, *Lopes v. Wren*, U.S.D.C. Northern District, Case No. C 06-03705 CRB, attached as Exhibit C to Defendants Request for Judicial Notice.

1 On July 15, 2004, a criminal complaint and arrest warrant were issued charging
2 the plaintiff with misdemeanor battery arising from the June 12, 2004 collision. (Exhibit
3 A, attached to Doc 44 filed 5/20/08). The charges were dismissed on October 12, 2005.
4 (Exhibit B, attached to Doc 44 filed 5/20/08).

5 On March 16, 2006, Plaintiff filed suit against Defendant Fremont Freewheelers
6 Bicycle Club and 10 other named individuals for injuries suffered as a result of his
7 actions on June 12, 2004 (Exhibit D, attached to Doc 44 filed 5/20/08). After trial on the
8 matter, on July 24, 2007, the court entered Judgment on Jury Verdict (Exhibit E, attached
9 to Doc 44 filed 5/20/08).
10

11 III. PROCEDURAL HISTORY

12 On or about November 2, 2007, plaintiff filed the current litigation in Alameda
13 Superior Court. On or about November 8, 2007, plaintiff filed his first amended
14 complaint which contained 18 causes of actions against 33 individuals and entities.
15

16 Plaintiff's complaint alleges 18 counts or causes of action against all or some of
17 the defendants. Count 1 alleges a violation of his civil rights under 42 U.S.C § 1983 and
18 1985. Count 2 alleges that plaintiff is entitled to civil remedies under 18 U.S.C. §
19 1964(a). Count 3 alleges a violation of plaintiff's civil rights under 42 U.S.C. § 1983.
20 Count 4 alleges violations of plaintiff's civil rights under the 14th Amendment to the U.S.
21 Constitution. Count 5 alleges that defendants should be charged under "ss242". Count 6
22 alleges plaintiff's due process rights were violated under the 14th Amendment to the U.S.
23 Constitution. Count 7 alleges a violation of 18 U.S.C §1962(d). Count 8 alleges various
24 defendants violated plaintiff's right under 42 U.S.C §1985 and 42 U.S.C. §2000(b) and
25 (c). Count 9 alleges plaintiff has suffered injury in violation of 42 U.S.C. §1985. Count
26
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1 10 alleges negligence. Count 11 alleges defendants violated plaintiff's rights under the
2 14th Amendment to the United States Constitution. Count 12 alleges defendants violated
3 plaintiff's rights under the 14th Amendment to the United States Constitution and
4 pursuant to 42 U.S.C. § 1981. Count 13 alleges that plaintiff's Fifth Amendment right
5 against self-incrimination under the United States Constitution was infringed. Count 14
6 alleges defendants violated plaintiff's right under the Sixth Amendment to the United
7 States Constitution. Count 15 alleges plaintiff's rights under the 14th Amendment to the
8 United States Constitution were violated. Counts 16, 17, and 18 allege various causes of
9 action but do not specify the statutory basis for those injuries.
10

11 Defendant Sally Wilson was named in Counts 5, 6, 7, 8, 12, and 18. Defendant
12 Richard Brockie was named in Counts 3, 4, 6, 8, 12, and 18. Defendant Timothy O'Hara
13 was named in Counts 5, 6, 7, 8, 12, and 18. Defendant Fremont Freewheelers was named
14 in Counts 1, 2, 3, 5, 6, and 7.
15

16 On December 7, 2007, this case was removed from the Alameda Superior Court
17 to the Northern District of California because the complaint contained a federal question.
18 On December 13, 2007, Defendant CB Richard Ellis, Inc. filed its Motion to Dismiss
19 pursuant to 12(b)(6) on grounds that *res judicata* and statute of limitations. On March 10,
20 2008, this court granted Defendant CB Richard Ellis, Inc.'s motion and dismissed it from
21 this case.
22

23 On May 7, 2008, Defendant Larry Nolan filed his Motion to Dismiss pursuant to
24 12(b)(6). On May 15, 2008, Defendants USA Cycling, Inc. and Linda Buffetti filed their
25 Motion to Dismiss pursuant to 12(b)(5)(6). On May 13, 2008, Defendants Lisa Faria,
26 Shara Mesic Beltrano and Stacy Pettigrew filed their motion to dismiss pursuant to
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1 12(b)(6). On May 20, 2008, Defendants Jason Sage and Garry Birch filed their Motion to
2 Dismiss Pursuant to 12(b)(6).

3 On May 16, 2008 Plaintiff filed Proof of Service that he had served Defendants
4 Sally Wilson, Richard Brockie, Timothy O'Hara, and Fremont Freewheelers Bicycle
5 Club.

6
7 On June 2, 2008 Defendants Joseph Wren, Newark Police Department, and Jim
8 Davis filed their Motion to Dismiss pursuant 12(b)(6).

9 **IV. ARGUMENT**

10 **A. DEFENDANTS WERE NOT PROPERLY SERVED**

11 Defendants move that the complaint be dismissed under FRCP 12(b)(5) since
12 there is an insufficiency of service of process in this matter. Once service is challenged,
13 plaintiff bears the burden of establishing that service was valid under FRCP Rule 4.
14
15 *Brockmeyer v. May*, 383 F.3d 788, 801 (9th Cir. 2004).

16 **1. Defendant Fremont Freewheelers Bicycle Club was not properly served**

17 According to the Return of Service filed by plaintiff on May 16, 2008 (Document
18 52), the process server claims to have properly served Fremont Freewheelers by serving
19 the daughter of Garry Birch at 8126 Locust Place, Dublin, CA. According to the
20 declaration of Jeff Girard, president of Fremont Freewheelers Bicycle Club (Exhibit 1),
21 neither Garry Birch nor his daughter are either the registered agent or an officer of the
22 organization. The proper registered agent is a Karen White who lives in Fremont,
23 California.
24

25
26 The Federal Rules of Civil Procedure require that a Corporation be served by:

27 (A) In the manner prescribed by Rule 4(e)(1) for serving an
28 individual; or (B) by delivering a copy of the summons and of the

1 complaint to an officer, a managing or general agent, or any other
2 agent authorized by appointment or by law to receive service of
3 process and – if the agent is one authorized by statute and the
4 statute so requires -- by also mailing a copy of each to the
5 defendant

6 FRCP 4(h).

7 Since Fremont Freewheelers was not properly served and since the time of service
8 of process has expired (Doc 26 – Order), Fremont Freewheelers request this Court to
9 quash service of process and dismiss them from this matter.

10 **2. Defendant Timothy O’Hara was not properly served**

11 The Return of Service claiming to have properly served Timothy O’Hara which
12 filed by plaintiff on May 16, 2008 (Document 53) is defective. First, the declaration of
13 server is not dated. Second, the individual who signed the declaration is not the individual
14 who actually gave the documents to Timothy O’Hara. Third, according to the declaration
15 of Timothy O’Hara (Exhibit 2), O’Hara was not given a copy of the complaint until May
16 2, 2008. O’Hara received a copy of the complaint from a co-worker of the person who
17 signed the Declaration of Service. This Court has ruled that Service of Process was to be
18 completed by April 30, 2008 and thus Timothy O’Hara was served out of time.
19 Furthermore, it appears that the process server is stating that service of process was
20 complete when he received a copy of the Complaint from Plaintiff in order to serve upon
21 the Defendant.

22 This Court does not have jurisdiction over a defendant unless he has been
23 properly served pursuant to Rule 4. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th
24 Cir. 1982). Rule 4(m) provides: “If service of the summons and complaint is not made
25 upon a defendant within 120 days after the filing of the complaint, the court ... shall
26 dismiss the action without prejudice as to that defendant ...; provided that if the plaintiff
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1 shows good cause for the failure, the court shall extend the time for service for an
2 appropriate period.”

3 Therefore, since O’Hara did not receive a copy of the complaint within the
4 extended period of time permitted by this court, this Court does not have jurisdiction over
5 him and O’Hara requests this Court to quash service of process and dismiss him from the
6 matter.
7

8 **3. Defendant Richard Brockie was not properly served**

9 According to the Return of Service filed by plaintiff on May 16, 2008 (Document
10 49), service of process was completed upon a receptionist at Brockie’s place of work.
11 According to the declaration of Brockie (Exhibit 3), Brockie never received a copy of the
12 complaint from the receptionist. Furthermore, Brockie never received a copy of the
13 complaint in the mail after the supposed service of process at his place of business.
14

15 The Federal Rules of Civil Procedure require that an individual defendant be
16 served by:
17

18 (1) following state law for serving a summons in an action brought in
19 courts of general jurisdiction in the state where the district court is
20 located or where service is made; or (2) Doing any of the following:
21 (A) delivering a copy of the summons and of the complaint to the
22 individual personally; (B) leaving a copy of each at the individual’s
23 dwelling or usual place of abode with someone of suitable age and
24 discretion who resides there; or (C) delivering a copy of each to an
25 agent authorized by appointment or by law to receive service of
26 process.

27 FRCP 4(e).

28 “Under California law, a plaintiff may be served by leaving a copy of the
summons and complaint at the individual’s place of business and thereafter mailing those
documents to the business and addressing them to the person to be served. Cal Civ Proc
Code § 415.20.” Sutton v. Sokotowski, 2007 WL 1113950, *9 (N.D.Cal. 2007).

1 Since Plaintiff failed to serve Brockie as required by law, Brockie requests that
2 the Court quash service and dismiss him from the matter.

3 **4. Defendant Sally Wilson was not properly served**

4 According to the Return of Service filed by plaintiff on May 16, 2008 (Document
5 56), service of process was completed upon a secretary at Wilson's place of work.
6 According to the declaration of Wilson (Exhibit 4), Wilson never received a copy of the
7 complaint in the mail after the supposed service of process at her place of business.
8

9 As previously discussed, under California law, if a person attempts to serve a
10 person at work, the complaint must be left with a person in charge and the plaintiff must
11 subsequently mail to the Defendant a copy of the complaint. Whether or not the secretary
12 was a sufficient party for service of process, the fact remains that Wilson did not receive
13 nor does the process server swear that he mailed a copy of the complaint to Wilson after
14 the copy of the complaint was left at her place of business.
15

16 Since Plaintiff has failed to comply with the law regarding service of process,
17 Wilson requests that the Court quash service and dismiss her from the matter.
18

19 **B. THE CLAIMS ARE BARRED BY THE STATUTES OF LIMITATION**

20 Plaintiff has sued Defendants under 42 U.S.C. 1981, 1983, 1985. All facts in the
21 First Amended Complaint deal with the time period between when the accident occurred
22 and when the District Attorney filed charges against the Plaintiff.
23

24 "The Ninth Circuit Court of Appeals has determined that claims brought under 42
25 U.S.C. § 1981 in California are governed by California's statute of limitations for
26 personal injury actions. Accordingly, Plaintiff's 42 U.S.C. § 1981 claim is governed by
27 California's statute of limitations for personal injury actions, which is two years."
28

1 (Cal.Code of Civ. Proc § 335.1) *Batiste v. City of Emeryville*, WL 1811158, (N.D.Cal
2 2004).

3 “Because section 1983 does not contain a statute of limitations, federal courts
4 apply the forum state’s statute of limitations for personal injury actions and incorporate
5 the forum state’s law of tolling, both statutory and equitable, unless it is inconsistent with
6 federal law. As of January 1, 2003, California’s statute of limitations for personal injury
7 actions is two years; before that, it was a year.” *Sumahit v. Parker*, 2008 WL 449713,
8 (E.D.Cal. 2008).

9
10 “The Statute of Limitations for actions filed under 42 U.S.C. § 1985(3) is not
11 specified by federal law. The rule, under these circumstances, is that the most analogous
12 Statute of Limitations of the State from which the claim arose governs.” Smith v. Private
13 Industry Council of Westmoreland and Fayette counties, Inc., 622 F.Supp. 160, 167-168
14 (USDC W.D.Penn 1985). Thus the applicable California Statute of Limitations would be
15 two years under California Code of Civil Procedure § 335.1.
16

17
18 Even if the court were to construe the conspiracy in the broadest possible terms
19 and find that the conspiracy lasted until criminal charges were dismissed against the
20 plaintiff, the two-year statute of limitations has run since the criminal charges were
21 dismissed on October 12, 2005 and this present litigation was filed over two years later,
22 on November 2, 2007.
23

24 Plaintiff also sued Defendants Wilson, Brockie, and O’Hara for malicious
25 prosecution in Count 18. Even if these allegations could be proved, the applicable statute
26 of limitations for a Malicious Prosecution is two years under California Code of Civil
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1 Procedure 335.1. Since over two years had elapsed between the dismissal of the criminal
2 charges and the filing of the current litigation, the statute of limitations has run.

3 Therefore, the statutes of limitation bars the claims.

4 **C. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION ON**
5 **WHICH RELIEF CAN BE GRANTED**

6 In Count 5, both Defendant Wilson, O'Hara and Fremont Freewheelers are sued
7 and the plaintiff does not state any statutory reasons for the cause of action but does state
8 that "Defendants should be charged with ss242". Nowhere in the complaint does Plaintiff
9 state the title to "ss242" but it appears that Plaintiff is suing under 18 U.S.C. 242. In
10 addition, Defendants Wilson, O'Hara and Fremonet Freewheelers are sued in Count 7 for
11 violations to 18 USC 1962. Title 18 of the United States Code deal with criminal
12 violations and Plaintiff is not a proper party to bring such litigation even if the facts he
13 alleged were correct.
14

15 Therefore, Counts 5 and 7 should be dismissed.
16

17 In Count 4, Defendant Richard Brockie is sued for violations of Plaintiff's
18 Fourteenth Amendment rights and Due Process of law. However, Plaintiff has failed to
19 state how Defendant Brockie was a state actor who could even if he wanted to violate
20 Plaintiff's due processes under the law. Therefore, Count 4 must be dismissed.
21

22 **D. THE CLAIMS ARE BARRED AGAINST FREMONT**
23 **FREEWHEELERS BICYCLE CLUB BY THE DOCTRINE OF RES**
24 **JUDICATA**

25 Plaintiff originally filed suit against Fremont Freewheelers Bicycle Club and 10
26 other individuals or entities with an attorney representing him on March 16, 2006. (See
27 Exhibit D attached to Request for Judicial Notice). The court may take judicial notice of
28 these official records for purposes of this Rule 12(b)(6) motion. *Henson v. CSC Credit*

1 *Services*, 29 F.3d 280, 284 (7th Cir. 1994); *Day v. Moscow*, 955 F.2d 807, 811 (2nd Cir.
2 1992).

3 Res judicata, or claim preclusion, prohibits the re-litigation of any claims that
4 were raised or could have been raised in a prior action. *Western Radio Servs. Co.*, 123
5 F.3d 1189, 1992 (9th Cir. 1997). The purpose of the doctrine is to “relieve parties of the
6 cost and vexation of multiple law suits, conserve judicial resources, and, by preventing
7 inconsistent decisions, encourage reliance on adjudication.” *Marin v. HEW, Health Care*
8 *Financing Agency*, 769 F.2d 590, 594 (9th Cir. 1985). Res judicata has three
9 requirements. First, there must be an identity of claims, but the claims need not be
10 identical. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713-714 (9th Cir.
11 2001). The central criterion in determining whether there is an identity of claims between
12 the first and second adjudications is whether the two suits arise out of the same
13 transactional nucleus of facts. *Id.* at 714. Second the previous action must have resulted
14 in a final judgment on the merits. *Id.* at 713. Third, there must be identity or privity
15 between the parties. *Id.*

16 Here, the plaintiff is the same in both cases. Furthermore, while the previous
17 litigation filed in Alameda Superior Court dealt with negligence arising from the
18 pedestrian bicycle accident that occurred in Fremont California on June 12, 2004, the
19 current litigation deals with various actions taken by Fremont Freewheelers in reporting
20 the events of the accident to the local authorities. Since the criminal charges were
21 dismissed on October 12, 2005 and plaintiff filed the negligent suit against Defendant
22 Fremont Freewheelers on March 16, 2006, plaintiff knew all the facts and could have
23 plead at that time his current claims of constitutional violations. Defendant Fremont
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1 Freewheelers and others should not constantly be brought back into court over claims
2 arising from the exact same set of facts.

3 Therefore, the doctrine of Res Judicata bars this current litigation against
4 Defendant Fremont Freewheelers.

5 **V. CONCLUSION**

6
7 For the reasons set forth above, the motion should be granted.

8 Respectfully submitted,

9 Dated: June 2, 2008

by: /s/ Mark P. Meuser

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